



April 10, 2001

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-3761

OR2001-1437

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145832.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for any and all documents submitted by a company called ValueOptions to the department concerning various issues pertaining to the NorthSTAR program, as well as any and all responses by the department to ValueOptions with respect to such issues, from September of 2000 to the present. You claim that a portion of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy, as well as state and federal statutes and regulations. In addition, you have notified ValueOptions of the request for information pursuant to section 552.305 of the Government Code.¹ ValueOptions responded with a letter to this office in which it argues that a portion of the information responsive to the request is protected as a trade secret and/or commercial or financial information under section 552.110, and that another portion is made confidential under section 552.101 in conjunction with section 159.002 of the Occupations Code, otherwise known as the Medical Practice Act ("MPA"). We will first address the department's argument under section 552.101 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We agree that the highlighted client-identifying information in exhibit 3 must be withheld under section 552.101 in conjunction with common law privacy. As we find that common law privacy is dispositive with regard to client-identifying information, we need not address your other raised arguments for withholding this information.

We next address the arguments raised by ValueOptions. In its letter to this office, ValueOptions identified 17 documents, numbered 1-17, that it received from the department which the department believes are responsive to the request. These documents correspond to the documents submitted to this office by the department labeled "Exhibit 4". ValueOptions does not object to the disclosure of documents numbered 2, 4, 6, and 8-12. Since neither ValueOptions nor the department has made an argument for withholding this information, the documents ValueOptions has numbered 2, 4, 6, and 8-12 must be released to the requestor. ValueOptions does, however, argue that the documents numbered 1, 3, 5, 7, and 13-17 are excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

Based upon our review of the documents and the arguments presented by ValueOptions, we conclude that the submitted information does not meet the definition of "trade secret" for purposes of section 552.110(a) in that it appears to be information that relates to "a single or ephemeral event in the conduct of business." With regard to section 552.110(b), in Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. Federal cases applying the FOIA exemption four have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government); *see also* Open Records Decision Nos. 541 (1990), 514 (1988). We believe a legitimate public interest exists in the information ValueOptions seeks to withhold under section 552.110(b) which outweighs any proprietary interest ValueOptions may have in this information. Therefore, we conclude that the information at issue does not fall within the protection of either the trade secret or the commercial or financial information branch of section 552.110, and it may not be withheld under this section.³

ValueOptions also asserts that a portion of the requested information pertaining to the names and summaries of medical expenses incurred by patients participating in the NorthSTAR program is confidential under the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

³The company cites Open Records Letter Ruling No. 99-3682 in support of withholding the information at issue. However, the information at issue in the instant case is distinctly different. Open Records Letter Ruling No. 99-3682 concerned portions of the proposals submitted by the company and the requestor. The information at issue here concerns the revenues and expenses of the company over a specific time period, as well as information relating to certain issues arising from the administration of the NorthSTAR program.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Upon review of the information ValueOptions seeks to withhold under the MPA, we conclude that the monetary figures are not "record[s] of the identity, diagnosis, evaluation, or treatment of a patient by a physician" for purposes of the MPA. Therefore, this information may not be withheld under the MPA.⁴

To summarize, the department must withhold the information that you have highlighted in pink in exhibit 3 under section 552.101 in conjunction with common law privacy. The remaining responsive information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

⁴As we find that the names of patients are protected under common law privacy, we need not address ValueOptions assertion that these names are protected by the MPA.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 145832

Encl. Submitted documents

cc: Mr. Steve Niemi
Senior Vice President
Magellan Behavioral Health
4900 University Avenue, Suite 204
West Des Moines, Iowa 50266
(w/o enclosures)

Ms. Diane T. Carter
Hilgers & Watkins
P.O. Box 2063
Austin, Texas 78768
(w/o enclosures)